Supreme Court, U.S.
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# ORIGINAL

No. 99-8576

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1999

PAUL L. GLOVER,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

**REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

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The Respondent's brief puts forward no sound justification for denying this petition for a writ of certiorari. The Government nowhere disputes that this case presents an important and recurring issue which will affect numerous individuals. The Government also makes no serious effort to defend the constitutional merits of the Seventh Circuit's "significant prejudice" rule. Rather, the Government attempts to divert attention by arguing that petitioner Glover failed to satisfy the "deficient performance" prong of *Strickland*. Putting aside the blatant nature of the error of Mr. Glover's counsel – failing to raise a dispositive Seventh Circuit case in Glover's favor – it should be recognized that both the federal district court and appeals court relied solely



on the "prejudice" prong of *Strickland* in deciding this case. Furthermore, contrary to its intention, the Government's review of the various courts of appeals' opinions relating to the "signficant prejudice" requirement only confirms the conflict among the circuits on this issue.

## ARGUMENT

### 1. This Case Presents An Issue of Recurring Importance.

The Government does not, and could not, dispute that this case presents an issue of recurring importance. As Glover's Petition noted, courts in the Seventh Circuit alone have applied this "significant prejudice" rule to deny relief to wrongfully sentenced prisoners in more than a dozen reported decisions. *See* Pet., at 23 & n.11. Numerous decisions also exist from the other courts of appeals. *Id.* at 14-20. Moreover, countless cases of counsel's mistakes in interpreting the Sentencing Guidelines go unreported. The "significant prejudice" rule is the current state of the law in the Seventh Circuit and several other circuits. *Id.* The grant of the writ of certiorari is necessary to review whether the courts in these circuits are misinterpreting the Constitution and this Court's precedents relating to the ineffective assistance of counsel and the sentencing guidelines.

The importance of this case is underscored by the amicus brief filed by the Families Against Mandatory Minimums Foundation ("FAMM"). FAMM is a nonprofit, nonpartisan organization which has 30 chapters and 18,000 members nationwide. FAMM's special area of expertise involves sentencing issues. Based on its study of the issue, FAMM "believes that attorney error in Guidelines sentencing is a recurring problem" and that the questions presented by this petition "are important to the administration of federal criminal justice." FAMM Br., at

2-3. Nowhere does the Government challenge FAMM's conclusions or otherwise dispute the wide-ranging impact of the "significant prejudice" requirement at issue in this case.[1]

## 2. The Seventh Circuit's "Significant Prejudice" Requirement Is Contrary To Supreme Court Precedent

The Government's brief also is noteworthy for its lack of any real defense of the merits of the Seventh Circuit's rule. While the Government asserts that errors of sentencing guideline interpretation ca not usually be raised on habeas and that prisoners often attempt to raise these sentencing issues by alleging constitutionally ineffective assistance of counsel, Gov. Opp., at 6-7, the Government does not explain how that justifies the "significant prejudice" requirement. Tellingly, the Government makes no attempt to set out the constitutional underpinnings of this Seventh Circuit test. The Government fails to point out where in *Strickland v. Washington*, 466 U.S. 688 (1984), there is any support for a "significant prejudice" requirement. The Government also fails to explain how *Lockhart v. Fretwell*, 506 U.S. 364 (1993), or any other Supreme Court opinion supports a "significant prejudice" test. In fact, the entire Government's brief is bereft of any discussion of the constitutional derivation or justification for the Seventh Circuit's rule.[2]

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1 Counsel for petitioner has taken this representation on a pro bono basis because of the importance of the legal question presented by this case.

2 The extent of the Government's constitutional 'analysis' is found in its footnote 4. There, the Government attempts to refute petitioner's argument that the Seventh Circuit's rule is inconsistent with *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) and other cases which hold that a defendant is entitled to counsel in any case resulting in imprisonment, even if the imprisonment is only a few months. *Id.* The Government argues that the Supreme Court cases are distinguishable because they involve no counsel at all, rather than ineffective assistance of counsel. Yet, the Government never explains why this distinction makes any difference. The basic principle of those cases is directly applicable here – even a few months additional imprisonment is 'significant' for Sixth Amendment purposes. *Argersinger*, 407 U.S. at 37.



## 3. This Case Clearly Presents The Issue Of The "Significant Prejudice" Requirement

Rather than defend the "significant prejudice" requirement, the Government spends pages arguing that the performance of Glover's counsel was not professionally deficient as required by *Strickland's* first prong. Gov. Opp., at 7-9. This argument is a red-herring. In fact, *the Government never raised the issue of the first prong of Strickland in the court of appeals below.* The federal district court and court of appeals never asserted that Mr. Glover's counsel had satisfied the appropriate professional standard. Instead, both the district and appellate courts decided this case against Glover *solely* on the grounds that Mr. Glover could not satisfy the "significant prejudice" requirement under *Strickland's* second prong. This is not a case where there are alternative legal bases for the decision of the lower court. Rather, this case presents only one issue – whether there is a "significant prejudice" requirement for ineffective assistance of counsel under the Sixth Amendment which is not satisfied by between 6 and 21 months of additional (and incorrect) imprisonment.[3]

## 4. The Seventh Circuit's Interpretation Of "Prejudice" Conflicts With Other Circuits and District Courts

The Government also attempts to deny that there is any divergence in approach among the courts of appeal, arguing that the numerous cases cited by petitioner involved "longer

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3 Furthermore, it is readily apparent that Mr. Glover's counsel was deficient. He failed to bring the favorable controlling decision in *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996), to the Seventh Circuit's attention, even though Mr. Glover's appeal was still pending at the time. "Solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention. . . . [C]ounsel, by failing to cite directly controlling precedent, rendered deficient assistance." *United States v. Williamson*, 183 F.3d 458, 463 (5th Cir. 1999).

potential increases in sentence than the 6-21 months at issue in this case." Gov. Opp., at 12. Yet, the Seventh Circuit has found that a 42 additional month imprisonment is "insignificant." *Allen v. United States*, 175 F.3d 560, 563 (7th Cir.), *cert denied*, 120 S. Ct. 432 (1999); *see also Robinson v. United States*, 196 F.3d 748, 754 (7th Cir. 1999) (32 additional months in prison; no prejudice); *United States v. Paz*, 1997 WL 158338 (N.D. Ill. March 31, 1997) (41 additional months in prison; no prejudice). Furthermore, the Seventh Circuit has adopted a *per se* rule that "significant prejudice" requires a mistake of more than two offense levels. *See* Pet., at 14 & n. 5. Because the cases from the other circuit courts involve a change of two or less offense levels, these decisions conflict with the Seventh Circuit rule. *Id.*, at 14-20.

Moreover, in the recent case of *United States v. Phillips*, 210 F.3d 345, 351-52 (5th Cir. 2000), the Fifth Circuit admitted that its approach expressly conflicts with the Seventh Circuit. In granting the habeas petition, the Fifth Circuit in *Phillips* acknowledged that the Seventh Circuit would reach a different result. The *Phillips* Court noted that, although both the Fifth and Seventh Circuits rely on the decision in *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993), the Seventh Circuit "ignored our direction that demonstrably erroneous enhancements would still justify relief regardless of their 'significance,' and it correspondingly ignored our above-noted rationale for imposing the 'significant prejudice' requirement." *Phillips*, 210 F.3d at n. 4 (citations omitted). Thus, even those courts adopting the "significant prejudice" test have explicitly clashed as to its interpretation and application.

Lastly, the Government appears to argue that granting certiorari is unnecessary because *Phillips* and the recent Supreme Court decision in *Williams v. Taylor*, 120 S. Ct. 1495 (2000), may lead the Seventh Circuit to "reassess" its "significant prejudice" requirement. Gov. Opp., at 14. This is wishful thinking in the extreme. There is no reason to believe that the Seventh



Circuit has any intention to revisit this rule. The *Phillips* decision is only an opinion of a panel from another circuit, while *Williams* is not written with this "significant prejudice" issue in mind and is not so explicit as to compel the Seventh Circuit to reverse itself on this issue. The "significant prejudice" rule was the subject of a vehement dissent from a denial of rehearing en banc by three judges less than three years ago. *See Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1996) (Judge Rovner, dissenting). The very reasoning found in *Phillips* and *Williams* was presented vigorously in that dissent, but to no avail. The "significant prejudice" requirement is firmly established in the Seventh Circuit and has been applied by that court on numerous occasions. *See* Pet., at n. 11. It will continue to be used to keep individuals in prison for longer than their correct, lawful term, unless this Court grants this petition.

## CONCLUSION

For the reasons stated in the petition and in this brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
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PAUL L. GLOVER, PETITIONER

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CERTIFICATE OF SERVICE

Pursuant to this Court's Rule 29.5(b), I certify that I am a member of the Bar of this Court. I further certify that on June 2, 2000, at the time of hand delivery to this Court, I served three copies of the foregoing Reply Brief in Support of Petition for a Writ of Certiorari, pursuant to Rules 29.3 and 29.4(a), on counsel for the respondent, whose telephone number is (202) 514-2201, and amicus curiae, by depositing a copy of the same, first class postage prepaid, in the United States mails, addressed to:

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As a result, I state pursuant to Rule 29.5 that all parties required to be served have been served.

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